trust.[15] But in the case under consideration the continued existence of the *res* depended merely on its not being consumed in furthering the use to which it was limited for certain lives, so that the analogy to a remainder after a life estate in perishable property is very close. It is settled that such remainders are good although because of the disappearance of the subject-matter their enjoyment may never be realized,[16] and it is therefore conceived that no reason can be found why they should not support a trust equally with a mere possibility. In view of their analogy to the case under consideration it seems to follow that the court should have sustained the trusts in question. Indeed the chief difficulty on both branches of the case appears to have arisen from the use of a word so broad of application as "uncertainty," and it seems that had the more accurate term "indefiniteness" been employed the court might have reached a more satisfactory conclusion.

PREFERENCES TO CORPORATE DIRECTORS.—In recognizing that the relation of a director toward his corporation is of a fiduciary nature, the courts have established a doctrine not always easy of application. Thus, while it is readily perceived that according to this theory the director must be amenable for such breaches of trust as a fraudulent misapplication of corporate assets,[1] the exact consequences of the director's status are somewhat difficult of determination as affecting his right to receive a preference from his corporation. In view of the rule now well established that a solvent corporation, holding its property free of any trust in favor of creditors, may deal with it, subject to statutory or charter restrictions, with the same liberty as an individual,[2] it is clear that prior to insolvency, artificial as well as natural persons must have the power to create preferences as they may see fit, even though a director be the favored creditor. Similarly this should be true where the corporation, though in financial difficulty, is still a "going concern" with a reasonable expectation of ultimate success. Furthermore, even when the liabilities of a corporation exceed its assets, and it has ceased to do business, or has taken or is about to take a step which is likely to incapacitate it for conducting the corporate enterprise,[3] although in some few States the mere fact of its insolvency still operates to convert its assets into a trust fund for the benefit of creditors,[4] yet by the great weight of authority the application of this doctrine is now restricted to property in process

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[15]Hobson *v.* Trevor (1723) 2 P. Wms. 191.

[16]Walker *v.* Pritchard *supra;* Evans *v.* Inglehart (Md. 1834) 6 Gill & J. 171; Major *v.* Herndon (1879) 78 Ky. 123.

[1]His responsibility of course is primarily toward the corporation rather than toward the stockholders, with whom he has no legal privity. Smith *v.* Hurd (Mass. 1847) 12 Met. 371.

[2]Morawetz, Private Corporations (2nd ed.) § 802; 5 Thompson, Corporations §§ 6482, 6496; and see Ames *v.* Heslet (1897) 19 Mont. 188; Worthen *v.* Griffith (1894) 59 Ark. 562.

[3]Corey *v.* Wadsworth (1891) 99 Ala. 68.

[4]In such jurisdictions, of course, even preferences to general creditors are disallowed. Rouse *v.* Merchant's Bank (1889) 46 Oh. St. 493; Conover *v.* Hull (1895) 10 Wash. 673; Lyons-Thomas Co. *v.* Perry Stove Co. (1893) 86 Tex. 143.

of administration,[5] and a corporation still in possession of its property is ordinarily at liberty, like an individual, to prefer not only general creditors but also its own directors, provided the security be given *bona fide* for present advances.[6] Such a doctrine, indeed, seems to be not only proper on principle but necessary in practice, in view of the more than possible contingency of the corporation's inability to obtain from any stranger not interested in its prosperity, the financial support perhaps indispensable to its existence.[7]

In the recent case of *Harle-Haas Drug Co.* v. *Rogers Drug Co.* (Wyo. 1911) 113 Pac. 791, the plaintiff, a corporate creditor, sought to set aside a renewal mortgage given by a corporation to a director to secure a precedent debt. The court properly declared that a mere renewal stood on the same footing as the original mortgage, which was given prior to insolvency and was therefore undeniably valid;[8] but the decision upholding the preference was based chiefly on the ground that in the absence of bad faith, a transfer made to directors to cover a preëxisting indebtedness is no less valid than one given in return for a present loan. Upon the question thus presented there is considerable confusion among the authorities, and courts are sometimes inconsistent with their own holdings as to preference to directors themselves, in dealing with the kindred cases of transfers to a near relative,[9] or to a creditor for whose claim the director is a surety.[10] It seems clear, however, that these transactions, in so far as they tend to further the individual interests of the director, should not because of their circuity alone be taken out of the operation of the principles governing preferences directly made. With the exception, then, of the jurisdictions still clinging to the strict trust-fund conception,[11] the courts which deny the right of directors to receive security for a preëxisting debt rely chiefly on the consideration that to permit officers of the corporation to profit by their superior knowledge and position would be inequitable towards other creditors.[12] While it is

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[5]Hollins *v.* Brierfield Iron Co. (1893) 150 U. S. 371; Bank *v.* Ward (1901) 111 Fed. 782; Hospes *v.* Car Co. (1892) 48 Minn. 174; 8 COLUMBIA LAW REVIEW 303.

[6]5 Thompson, Corporations § 6509.

[7]And in such transactions the corporation itself is fully protected by the fiduciary relation existing between it and its directors. Bank *v.* Ward, *supra.*

[8]See Mullanphy Bank *v.* Schott (1891) 135 Ill. 655; and note the distinction taken in Off *v.* Jack (1902) 104 Ill. App. 655.

[9]Illinois Steel Co. *v.* O'Donnell (1895) 156 Ill. 624; Blair *v.* Illinois Steel Co. (1896) 159 Ill. 350.

[10]Banking Co. *v.* McIntyre (1896) 98 Ga. 503; Levering *v.* Bimel (1897) 146 Ind. 545; Blair *v.* Illinois Steel Co. *supra.* The decisions which sustain such preferences, while denying those to directors personally, are based on the reasoning that the innocent creditor should not be made to suffer merely because a director has become his surety. If however the creditor has notice of the director's position as such, the hardship to the former should have no application in a determination of the power to give such preferences.

[11]See note 4.

[12]Rockford *v.* Standard Co. (1898) 175 Ill. 89; Graham *v.* Carr (1902) 130 N. C. 271; Olney *v.* Conanicut Land Co. (1889) 16 R. I. 597. And such jurisdictions very properly frustrate any evasion of the spirit of their rule. Nixon *v.* Goodwin (Cal. 1906) 85 Pac. 169; Mallory *v.* Kirkpatrick (1895) 54 N. J. Eq. 50. It is consistent with this theory, however, for a

doubtless true that preferences, however firmly rooted in the law, are always in a sense inequitable,[13] yet surely no common creditor has ever been debarred from receiving a preference solely on the ground that his information as to the debtor's circumstances was better than that of his fellows. Even therefore if such creditor is also a director, no sufficient reason appears for denying him the right to resort to all available legal methods for securing the payment even of preëxisting claims.[14] The possibility that he may take advantage of his position to perpetrate fraud being of course only an evidential difficulty not affecting the principle upon which his right is based,[15] is no ground for depriving him of this privilege. On the other hand, in upholding the validity of all preferences to directors on the theory that no fiduciary relation exists between them and the creditors,[16] and in sustaining such preferences despite misrepresentations on the part of the recipient relied on by the other creditors,[17] certain cases have gone to an unwarrantable extreme. The true rule, it is submitted, is the logical consequence of the theory of the director's fiduciary capacity. Upon the complete insolvency of the corporation, in the sense defined above,[18] even though the assets are not regarded in any strict sense as a trust fund, still it is apparently recognized that a claim upon the director's duty, and a right to insist upon his good faith is transferred to the creditors at the same time that they acquire the beneficial interest in the corporate assets. Since, however, the director is not technically a trustee, it would seem that nothing more should be required of him in accepting preferences from his corporation than to assume the burden ordinarily placed upon a fiduciary of showing his complete *bona fides* in the transaction.[19] Accordingly the decision in the principal case, in refusing to set aside such a preference, seems to be beyond criticism.

STANDING OF EXECUTORS AND ADMINISTRATORS IN A FOREIGN COURT.— The general rule that an executor or administrator cannot, as such, either sue or be sued in a State or country other than the one by

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director to receive a preference if he takes no undue advantage by virtue of his official position, Bank of Omaha *v.* Clark (1899) 58 Neb. 183, and even though he voted therefor, provided that his vote was not necessary for a majority. Swift & Co. *v.* Dyer-Veatch Co. (1901) 28 Ind. App. 1; Levering *v.* Bimel *supra*.

[13]Sabin *v.* Columbia Fuel Co. (1893) 25 Ore. 15; Gould *v.* Little Rock Ry. Co. (1892) 52 Fed. 680.

[14]Gould *v.* Little Rock Ry. Co. *supra;* Bank *v.* Ward *supra*.

[15]Corey *v.* Wadsworth (1897) 118 Ala. 488.

[16]Nappanee Canning Co. *v.* Murdoch (1902) 159 Ind. 614.

[17]Garrett *v.* Burlington Plow Co. (1886) 70 Ia. 697; Warfield Co. *v.* Marshall Canning Co. (1887) 72 Ia. 666.

[18]See note 3.

[19]Additional safeguards, as that the burden of proof is placed upon the directors to show that the transaction is not for their benefit alone, may be imposed. Schufeldt *v.* Smith (1895) 131 Mo. 280; Grimm *v.* Rubber Co. (1899) 149 Mo. 181. The uniform attitude of the courts in scrutinizing all such transactions most closely, eliminates the danger of abuse when the operation of the undoubted right to prefer general creditors is extended to directors.